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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Ty Kempton, individually and on behalf  
of all others similarly situated,  
Plaintiff,

v.

Life for Relief and Development, a  
California corporation,  
Defendant.

No. CV-19-2156-PHX-DJH

**MOTION TO DISMISS**

Defendant Life for Relief and Development (“Life for Relief”) respectfully  
moves this Court to dismiss Plaintiff’s complaint pursuant to Fed. R. Civ. P. 12(b)(2)  
and (3)<sup>1</sup>, or to transfer this case to the Eastern District of Michigan pursuant to  
U.S.C. §§ 1406 or 1404. Alternatively, if this Court elects to retain this case, Life for

<sup>1</sup> In accordance with the Court’s order of April 3, 2019 (Doc. No. 6), the parties have  
conferred to determine whether an amendment could cure deficiencies in the Complaint.  
To that end, the undersigned counsel for Life for Relief sent Plaintiff’s counsel a  
detailed letter outlining the facts and law supporting the Rule 12(b) portions of this  
motion. Less than an hour after receiving this motion, Plaintiff’s counsel responded  
refusing to amend the Complaint without further explanation. Therefore, this motion is  
necessary. The communications involved in this exchange are attached hereto as  
collective Exhibit 1.

1 Relief moves the Court to stay these proceedings while awaiting relevant, imminently  
 2 pending guidance from the Federal Communications Commission on key aspects of the  
 3 applicable statute, the Telephone Consumer Protection Act. The reasons this motion  
 4 should be granted are explained more fully in the attached memorandum of points and  
 5 authorities.  
 6

## 7 MEMORANDUM OF POINTS AND AUTHORITIES

### 8 **I. Introduction**

9 This case is the second brought by proposed class representative Ty Kempton  
 10 (“Plaintiff”) against defendant Life for Relief, a non-profit charity,<sup>2</sup> re-asserting claims  
 11 regarding eight text messages Plaintiff allegedly received over a two-year period.  
 12 Plaintiff claims that these eight texts violate the Telephone Consumer Protection Act  
 13 (“TCPA”), which prohibits texting a cell phone number without consent by using an  
 14 “automatic telephone dialing system” or “ATDS”. Plaintiff claims the texts harmed him  
 15 by “disturbing [his] use and enjoyment of his phone, in addition to the wear and tear on  
 16 the phones’ hardware.” Not incidental to the rash of TCPA class action filings like this  
 17 one, the TCPA also provides a minimum \$500 penalty for each text found to violate the  
 18 TCPA. To that end, Plaintiff and his class action lawyers wish to certify a national class  
 19 of all persons “similarly situated” for a four-year period.  
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24 <sup>2</sup> “Life for Relief and Development is a global humanitarian relief and development  
 25 organization, headquartered in Southfield, Michigan, USA. Life is dedicated to  
 26 providing humanitarian aid to people regardless of race, gender, religion and cultural  
 27 background. . . . Life is in Consultative Status with the Economic and Social Council of  
 28 the United Nations. It is also a member of InterAction, the largest alliance of U.S.  
 based NGO’s and partners with humanitarian agencies such as UNICEF, Brothers  
 Brother Foundation and World Medical Relief. . . . Over the past 26 years, Life has  
 distributed over \$462 million in humanitarian aid and relief to over 45 countries. . . .”  
 See [www.lifeusa.org/about](http://www.lifeusa.org/about).

1 Mr. Kempton made these same claims not once but twice in a prior-filed case  
2 against Life for Relief in the Eastern District of Michigan. (*See* Doc. Nos. 1 (Class  
3 Action Complaint) and 9 (Amended Class Action Complaint) in Case No. 3:18-cv-  
4 13404-RHC-SDD, Eastern District of Michigan (the “Michigan Case”).) He then  
5 voluntarily dismissed those claims after Life for Relief filed a substantive motion to  
6 dismiss. (*See* Doc. Nos. 10 (Life for Relief’s Motion “Michigan MTD”)) and 14  
7 (Kempton’s Notice of Voluntary Dismissal) in Michigan Case.) As Life for Relief’s  
8 motion pointed out, Mr. Kempton failed to plausibly plead that text messages were sent  
9 by an ATDS. (Michigan MTD at 5-10.) The motion also noted that the law in this area  
10 was in flux, and that many of the issues involved in the case would be dependent upon  
11 an imminent ruling from the guiding regulatory body on the TCPA, the Federal  
12 Communications Commission (“FCC”). (*Id.* at 10-14.) Thus, Life for Relief asked that  
13 – as an alternative to dismissal – the court stay the case pending the FCC’s ruling on the  
14 relevant issues, such as how “consent” is to be interpreted for cellular numbers (like  
15 Plaintiff’s) that were transferred from a prior owner who had consented to receiving  
16 texts. (*Id.*)

20 Apparently realizing the futility of his claims, Mr. Kempton has now forum-  
21 shopped his case down to Arizona, a state in which Life for Relief has no physical or  
22 other presence warranting the exercise of jurisdiction. And he did so without waiting  
23 for the FCC’s ruling, despite knowing that numerous key issues related to this dispute  
24 remain in near-term limbo.  
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1 Plaintiff's re-filed complaint was clearly done in a rush to try and gain a  
 2 jurisdictional advantage. But it was also done in a way that requires its dismissal,  
 3 because Plaintiff's complaint lacks factual support for dragging Life for Relief into  
 4 court in Arizona. Plaintiff's complaint includes only three threadbare, conclusory, and  
 5 vague assertions of ties between Life for Relief and Arizona. The laws of pleading,  
 6 jurisdiction, and venue require more. Without specific recitations showing ties between  
 7 Life for Relief and Arizona, Plaintiff's personal jurisdiction claims fail. And with that  
 8 failure, any claim of proper venue in Arizona also fails.  
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10 Should this Court disagree with Life for Relief on the problems with Plaintiff's  
 11 jurisdictional claims, this clearly forum-shopped case can and should nevertheless be  
 12 transferred back to the Eastern District of Michigan in the interests of justice and for the  
 13 convenience of the parties. Or, this Court should stay this case pending a decision from  
 14 the FCC on the key issues underlying this action.  
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17 **II. Plaintiff Lacks Facts Showing Sufficient Contacts Between Life for Relief**  
 18 **and Arizona to Support the Exercise of Personal Jurisdiction or Venue in**  
 19 **this District**

20 Faced with unfavorable law in its original venue and with an impending ruling  
 21 from the FCC that is likely to undercut its claims, Plaintiff rushed to file new claims  
 22 against Life for Relief in Arizona without enough facts to support jurisdiction. As  
 23 demonstrated by the pleadings and the facts of this case, Plaintiff lacks facts supporting  
 24 either personal jurisdiction or venue over Life for Relief in this District.  
 25

26 *A. The Complaint Lacks Facts Showing Personal Jurisdiction Over Life for*  
 27 *Relief is Proper in Arizona, So Rule 12(b)(2) Requires Dismissal*  
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1 A federal court may only adjudicate a matter if it has jurisdiction over the parties.  
2 *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).  
3 In Arizona, absent a federal statute to the contrary the exercise of personal jurisdiction  
4 over non-resident defendants is governed by its long-arm rule. *Menken v. Emm*, 503  
5 F.3d 1050, 1056-57 (9th Cir. 2007). That rule, bounded by the limits of federal Due  
6 Process, “requires that nonresident defendants have certain minimum contacts with  
7 [Arizona], so that the exercise of personal jurisdiction does not offend traditional  
8 notions of fair play and substantial justice.” *Doe v. Am. Nat’l Red Cross*, 112 F.3d  
9 1048, 1050 (9th Cir. 1997); *see also* Ariz. R. Civ. P. 4.2(a). Where a defendant’s  
10 contacts are “substantial” or “continuous and systematic,” that defendant is considered  
11 “present” in the forum for all purposes, and subject to “general jurisdiction.” *Tuazon v.*  
12 *R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006). Absent those substantial,  
13 continuous, and systematic contacts, the defendants’ “minimum contacts” to Arizona  
14 must be tied to the cause of action being asserted, which is called “specific jurisdiction.”  
15 *Brayton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009).

16 Life for Relief moves to dismiss the claim against it for lack of personal  
17 jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Therefore, Plaintiff bears the burden of  
18 demonstrating the actions of nonresident Life for Relief support a claim of general or  
19 specific jurisdiction. *Menken*, 503 F.3d at 1056. And just like other factual allegations,  
20 that burden requires Plaintiff to include facially plausible factual allegations in his  
21 complaint, not labels or conclusions, that support the personal jurisdiction claim. *MGA*  
22 *Entertainment, Inc. v. Innovation First, Inc.*, 525 Fed. Appx. 576, 578 (9th Cir. 2013),  
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1 citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *Palnik v. Westlake*  
2 *Entertainment, Inc.*, 344 Fed. Appx. 249, 251 (6th Cir. 2009) (“[I]t remains the  
3 plaintiff’s burden and the complaint must have ‘established with reasonable  
4 particularity’ those specific facts that support [personal] jurisdiction.”). “Facially  
5 plausible” pleadings, in turn, require “factual content that allows the court to draw the  
6 reasonable inference” asserted by the plaintiff. *Iqbal*, 556 U.S. at 678, citing *Bell*  
7 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “Threadbare recitals ...  
8 supported by mere conclusory statements, do not suffice.” *Id.*, citing *Twombly*, 550  
9 U.S. at 555.  
10

11  
12 Plaintiff’s personal jurisdiction allegations in this case are limited to three  
13 factually unsupported and threadbare allegations. (Doc. No. 1 (“Complaint”), ¶¶6, 8.)  
14 Indeed, the allegations are so vague and conclusory that it is unclear whether plaintiff is  
15 claiming this Court has general or specific jurisdiction over Life for Relief. Plaintiff  
16 asserts two general-jurisdiction-like conclusions that Life for Relief “conducts business  
17 throughout this District, the state of Arizona, and the United States,” (Complaint, ¶6),  
18 and “solicits business within this District,” (Complaint, ¶ 8). But it also asserts a  
19 specific-jurisdiction-like conclusion that “the wrongful conduct giving rise to this case  
20 occurred in this District.” (Complaint, ¶8.) While the Court can dismiss these  
21 allegations as “mere conclusory statements”, *Iqbal*, 556 U.S. at 678, they do not support  
22 the assertion of jurisdiction anyway.  
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26 Allegations that Life for Relief “conducts business” and “solicits business” in  
27 Arizona are insufficient to support the application of general jurisdiction. The standard  
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1 for general jurisdiction is high; contacts not only must be “continuous or systematic”  
2 with the state, they must “approximate physical presence.” *Schwarzenegger v. Fred*  
3 *Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004). “Put another way,” not only must  
4 a defendant “step[] through the door” of the state, it must also “[sit] down and [make]  
5 itself at home.” *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284  
6 F.3d 1114, 1125 (9th Cir. 2002). Conducting or soliciting business in a state, alone, is  
7 insufficient to invoke general jurisdiction. *Schwarzenegger*, 374 F.3d at 801.

8  
9 Similarly, the conclusion that some relevant “conduct ... occurred in this  
10 District” is insufficient to support a claim of specific jurisdiction. An allegation of  
11 specific jurisdiction based on conduct “in this District” requires more than just the  
12 existence of conduct. Instead, the allegations must show that the conduct was  
13 defendant’s conduct, and that it “purposefully avail[ed]” itself of the of the benefits and  
14 protections of the laws of the state by allowing or promoting the transaction of business  
15 in Arizona. *See Gray & Co. v. Firstenberg Machinery Co., Inc.*, 913 F.2d 758, 760 (9th  
16 Cir. 1990). The inquiry thus does not focus on conduct generally, but instead “focuses  
17 on the relationship between the defendant, the forum, and the litigation...and the  
18 ***defendant’s conduct and connection with the forum state....***” *See Batton v. Tennessee*  
19 *Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271 (1987), citing *Keeton v. Hustler Magazine,*  
20 *Inc.*, 465 U.S. 70, 775 (1984), *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); and *World-*  
21 *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), emphasis added.

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23 Plaintiff’s allegations fail to meet this standard on every level. Plaintiff’s  
24 assertion that some unnamed “conduct” occurred in Arizona fails to specify who  
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1 performed the conduct, whether that party purposefully engaged in that conduct, or how  
2 that conduct relates to Plaintiff's claims. Even if we assume that Plaintiff was referring  
3 to Life for Relief in this section of its complaint, his failure to specify what conduct is  
4 being invoked renders it impossible to tell if and how Life for Relief may have  
5 "purposefully availed" itself of Arizona's laws with that unnamed conduct. Under the  
6 pleading standards outlined by the Supreme Court in *Iqbal* and *Twombly*, these kinds  
7 of unsupported and unexplained allegations are insufficient as a matter of law.  
8

9 To be clear, the few specific allegations of conduct Plaintiff claims were  
10 performed by Life for Relief do not save Plaintiff's jurisdictional claims. Plaintiff's  
11 allegations are that jurisdiction is supported based on "wrongful conduct" that  
12 supposedly occurred "in this District." (Complaint, ¶ 8.) While Plaintiff claims Life for  
13 Relief sent him text messages, nowhere does Plaintiff assert anywhere that the text  
14 messages were either sent or received in Arizona. In fact, none of the actual facts  
15 support any "conduct" by Life for Relief in this District, since Life for Relief (1) is not  
16 an Arizona corporation, (2) lacks any physical presence in Arizona, (3) lacks any full-  
17 time employees in Arizona, and (4) has never sent text messages from within Arizona.  
18 (See Declaration of Dr. Hany Saqr in Support of Motion to Dismiss and/or Transfer  
19 ("Saqr Dec."), attached hereto as Exhibit 2, at ¶¶4-7.)  
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23 The net effect of Plaintiff's pleadings on personal jurisdiction shows no support  
24 for personal jurisdiction over Life for Relief in this case. The allegations are at best  
25 "threadbare recitals" and "mere conclusory statements" that should be discounted by  
26 this Court. And what allegations are made do not support a claim of either general or  
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1 specific jurisdiction because they fail to show any connection between Life for Relief,  
2 the claims of this case, and Arizona. The complaint should therefore be dismissed  
3 because of a lack of personal jurisdiction over Life for Relief.

4 *B. The Lack of Personal Jurisdiction over Life for Relief Dooms Any Claim*  
5 *of Proper Venue in this District, Requiring Dismissal Pursuant to Rule 12(b)(3)*  
6 *and 28 U.S.C. § 1406(a)*

7 The lack of personal jurisdiction over Life for Relief also means that this Court is  
8 an improper venue for this dispute. Absent a more specific statute to the contrary, a  
9 plaintiff's claims may only be brought in the district courts authorized by the federal  
10 venue statute. 28 U.S.C. § 1391. Under that statute, corporations can be sued where  
11 they are subject to personal jurisdiction. *See* 28 U.S.C. § 1391(b)(1); 28 U.S.C. §  
12 1391(c)(2) (allowing suit where a corporation "resides", and defining corporate  
13 residency as where they are subject to "personal jurisdiction"); *see also* 28 U.S.C. §  
14 1391(b)(3) (providing catch-all venue for defendants where they are subject to  
15 "personal jurisdiction with respect" to the suit). Alternatively, assuming the existence  
16 of personal jurisdiction, a claim may be brought against a defendant where a  
17 "substantial part of the events or omissions giving rise to the claim occurred", or if the  
18 action involves property, a where "a substantial part" of that property is "situated." 28  
19 U.S.C. § 1391(b)(2).  
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23 A defendant who believes a case has been brought in the improper venue may  
24 move to dismiss or transfer the case pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §  
25 1406(a). Under that statute, dismissal and/or transfer is mandatory when venue is  
26 improper, requiring that the court "*shall* dismiss, or if it be in the interest of justice,  
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1 transfer such case to any district or division in which it could have been brought.” *Id.*,  
 2 emphasis added.

3 In this case, venue is not proper under § 1391(b) because there is no personal  
 4 jurisdiction over Life for Relief in Arizona, and because there is no non-conclusory  
 5 pleading showing any connection between the “events or omissions” that are asserted by  
 6 the Plaintiff and Arizona.<sup>3</sup> The reasons there is no personal jurisdiction here are  
 7 discussed above, and show that venue is improper under § 1392(b)(1) and (3). (*See*  
 8 Section II.A., *supra.*)

10 As for the “events or omissions” venue inquiry under § 1391(b)(2), Plaintiff’s  
 11 complaint fails to plead any conduct by Life for Relief that is tied to Arizona. The  
 12 venue inquiry “focuses on ‘relevant activities of the defendant, not of the plaintiff’”, and  
 13 therefore requires some conduct by a defendant to be specified. *See Renteria v.*  
 14 *Ramanlal*, 2009 WL 73675, at \*6, Case No. CV-07-00658-PHX-ROS (D. Ariz. Jan. 9,  
 15 2009), citing *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995). The relevant conduct  
 16 for this inquiry must be “substantial”, and “[d]istrict courts are to take the word  
 17 ‘substantial’ seriously; ‘for venue to be proper, significant events or omissions material  
 18 to the plaintiff’s claim must have occurred in the district in question ....” *Id.*, citing  
 19 *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005).

22 Here, all Plaintiff has pled is that there was some “wrongful conduct” that  
 23 occurred in this District. (Complaint, ¶ 8.) By failing to state what the conduct is,  
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26 <sup>3</sup> Plaintiff has not asserted a claim in which “property ... is the subject of the action....”  
 27 *See Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*, 660 F.Supp. 1536, 1543  
 28 (S.D.Tex.1987) (“more reasonable construction of clause [‘property that is the subject  
 of the action’] would make it applicable to suits involving property disputes or in rem  
 actions”).

1 Plaintiff has similarly failed to establish that the unnamed conduct is “substantial” under  
2 the venue rules. Indeed, as discussed above, it is not even clear that the alleged conduct  
3 is Life for Relief’s conduct, or whether Plaintiff is referring to his own conduct, and  
4 nowhere does Plaintiff allege that *any specific conduct* occurred in Arizona.

5  
6 Therefore, in addition to a lack of personal jurisdiction, venue is improper in this  
7 District, and the case should be dismissed. 28 U.S.C. § 1406.

8 *C. Plaintiff’s Refusal to Amend Demonstrates any Amendment Here Would*  
9 *be Futile*

10 Early in this case, this Court entered an order requiring the parties to meet and  
11 confer prior to filing a motion to dismiss under Fed. R. Civ. P. 12(b) to determine if the  
12 defects that are the subject of the motion “can be cured by filing an amended pleading”  
13 and whether the filing of a motion to dismiss “can be avoided.” (Doc. No. 6 at 1.) The  
14 clear purpose of that order was to avoid the time and expense of motions to dismiss that  
15 are quickly followed by requests to amend curable defects.

16  
17 Life for Relief, consistent with this Order, outlined the factual and legal bases  
18 for the Rule 12(b) aspects of this motion in a communication to Plaintiff’s counsel, and  
19 asked Plaintiff to consider amending. (*See* Collective Exhibit 1.) Plaintiff refused.  
20 (*Id.*) Importantly, Plaintiff did not assert that an amendment would render Life for  
21 Relief’s motion moot or cure the underlying factual problems with Plaintiff’s  
22 jurisdictional and venue claims. (*Id.*)

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25 Courts in this district have found that a refusal to amend following the parties’  
26 meet and confer requirement is equivalent to an admission that a further amendment  
27 would be futile. *See Matter of Estate of Williams*, 2013 WL 12190484, \*3 (D. Ariz.

Oct. 24, 2013). While normally leave to amend is granted “when justice so requires”, the admission of futility provides justification for denial of a further right to amend. *Id.* Following Plaintiff’s refusal to even discuss amendment, this Court should take that refusal as an admission that any amendment would be futile and deem the pleadings final for purposes of this motion. In turn, because Plaintiff has failed to plead the existence of personal jurisdiction or venue, Plaintiff’s claims should therefore be dismissed entirely and without leave to amend.

### **III. Plaintiff’s Blatant Forum Shopping, along with the Convenience of the Parties, Warrants Transfer Back to the Eastern District of Michigan**

Were this Court to find it has personal jurisdiction over Life for Relief, and to also find that venue is proper in this District, the Court should nonetheless transfer this case back to the Eastern District of Michigan under 28 U.S.C. § 1404 because it is in the interests of justice, and is the more convenient forum for the witnesses and the parties. Under §1404, a court may transfer a case to another district “[f]or the convenience of the parties and witnesses, [and] in the interest of justice....” The analysis under §1404 is based on an “individualized, case-by-case consideration of convenience and fairness.” *Steward Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988), quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). The determination is based on several factors, including the convenience of the witnesses and ease of access to the evidence. *Id.* While normally the plaintiff’s choice of forum is given weight, that preference is lowered significantly in class-action cases, *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *Lou v. Belzberg*, 834 F.2d 739, 739 (9th Cir. 1987), and disregarded

1 when forum-shopping is evident, *see Foster v. Nationwide Mut. Ins. Co.*, 2007 WL  
2 4410409, \*2 (N.D. Cal. Dec. 14, 2007).

3 Here, the history and facts of this action demonstrate that the Eastern District of  
4 Michigan is the more just and convenient forum for this dispute. Plaintiff originally  
5 agreed that Michigan was the proper forum for this dispute when it filed not one but two  
6 complaints in that district and asserted that venue was proper in that district. (*See* Doc.  
7 Nos. 1, ¶ 10 and 9, ¶ 10 in Michigan Case.) Plaintiff's filing in that district made sense,  
8 since Life for Relief's headquarters are in that district, as are its documents, employees,  
9 and facilities that are likely to be involved in this action. (Saqr Dec. at ¶¶ 4, 8.) It was  
10 only when facing substantive dismissal that Plaintiff tried to shift location to this  
11 district. In other words, instead of substantively defending its claims, Plaintiff sought  
12 another bite at the apple through dismissal and re-filing. This kind of blatant forum  
13 shopping is the exact kind of activity that the Ninth Circuit says should be  
14 "discouraged." *See United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1101, 1114-15  
15 (9th Cir. 2001). Thus, not only is Plaintiff's forum-shopping unjust, it is specifically  
16 disfavored in this Circuit.

17 Michigan is also more convenient for all parties because of the proximity to  
18 likely discovery sources. As noted previously, the relevant documents and witnesses  
19 are all likely to be in the Eastern District of Michigan. (Saqr Dec., ¶ 8.) And, given that  
20 Plaintiff seeks to certify this matter as a nationwide class action, maintaining a case in  
21 this District instead of where the discovery sources are located will not just  
22 inconvenience Life for Relief, but would also inconvenience every non-Arizona  
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1 putative class-action plaintiff. The lack of any real tie between the claims of this case  
 2 and Arizona renders it highly inconvenient and improper here.

3 Because it is in the interests of justice, and for the convenience of all potential  
 4 parties, as well as the relevant witnesses, if it is not dismissed this case should be  
 5 transferred back to the Eastern District of Michigan.  
 6

7 **IV. If this Court Elects not to Dismiss or Transfer this Case, it should be Stayed**  
 8 **Pending Clarification from the FCC**

9 Congress granted the Federal Communications Commission (“FCC”) the  
 10 authority to make rules and regulations to implement the TCPA. See 47 U.S.C. §  
 11 227(b)(2). Pursuant to that authority, the FCC issues findings and makes rulings  
 12 interpreting provisions of the TCPA, which findings and rulings are binding on the  
 13 district courts of the United States. Specifically, FCC orders are entitled to deference,  
 14 and are not subject to challenge by district courts. See, e.g., *Herrick v. GoDaddy.com*  
 15 *LLC*, 312 F.Supp.3d 793, 796 n. 3 (D. Ariz. 2018).  
 16

17 Here, there are critical issues that underly Plaintiff’s claim on which the FCC has  
 18 announced it will be providing guidance soon. Specifically, under the TCPA, a party  
 19 with “prior express consent of the called party” does not violate the statute when calling  
 20 or texting that party. 47 U.S.C. §227(b)(1)(A). Key to the application of this exception  
 21 is the meaning of the phrase “the called party.” While this phrase may seem relatively  
 22 simple, its application has proven challenging. The FCC acknowledged the difficulty  
 23 with this phrase, declaring the “called party” term “ambiguous” in a 2015 clarifying  
 24 order. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act*  
 25 *of 1991*, 30 F.C.C. Rcd. 7691, 2015 WL 4387780, ¶ 74 (2015).  
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1 The definition of the “called party” is especially important in the context of texts  
2 and calls to cellular telephone numbers. It is not uncommon for cellular telephone  
3 numbers to be reassigned from one individual to another. And, as the FCC  
4 acknowledged, “[t]here is no public wireless telephone number directory and  
5 individuals may change their phone numbers without notifying callers beforehand.” *Id.*  
6 at ¶ 71. Thus, a party who has received express consent to call or text a cellular number  
7 may text or call a number in good faith believing they have valid consent, and yet still  
8 result in contact with a person who has not consented. *See id.*, at ¶¶ 71-72.

10 In its 2015 Ruling, the FCC tried to navigate these two competing interests by:  
11 (1) defining the “called party” as the “current subscriber and customary users”; and (2)  
12 providing a one-call “safe harbor” to good-faith callers who reasonably believe they  
13 have consent. *Id.* at ¶ 72-3. But, in early 2018, the District of Columbia Circuit struck  
14 down the FCC’s “called party” definition and one-call safe harbor rule as arbitrary and  
15 capricious. *See ACA Int’l v. FCC*, 885 F.3d 687, 707-08 (D.C. Cir. 2018). In that  
16 ruling, the court acknowledged the FCC’s interpretation that a cellular subscriber’s  
17 express consent “does not lapse with reassignment,” hence allowing a “safe harbor” in  
18 the first place. *Id.* at 708. But the court also raised the question of “why should that  
19 [continuity of consent] necessarily stop with a single call?” *Id.* Failing to find an  
20 adequate answer in the FCC’s ruling, the D.C. Circuit struck it down. *Id.*

24 Following the *ACA Int’l* decision, the FCC issued a call for new comments,  
25 including comments “on how to treat calls to reassigned wireless numbers under the  
26 TCPA.” Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment  
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1 on Interpretation of the Telephone Consumer Protection Act in Light of the D.C.  
2 Circuit's ACA International Decision, DA 18-493, Released May 14, 2018, attached  
3 hereto as **Exhibit 3**. The FCC's notice sought comment on questions such as whether  
4 the term "called party" refers to "the person the caller expected to reach," "the party the  
5 caller reasonably expected to reach," "the person actually reached, the wireless  
6 number's present-day subscriber after reassignment," or a "customary user...rather  
7 than...the subscriber herself?" Ex. 3 at 3. It also sought comments on reasonable  
8 reliance of callers on prior consent, and whether a safe harbor was necessary. Ex. 3 at  
9 3-4. The period for comments originally ended on June 28, 2018, Ex. 3 at 1, but the  
10 FCC opened a brief supplemental comment period in October 2018, which ended  
11 October 17, 2018. See Public Notice, Consumer and Governmental Affairs Bureau  
12 Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of  
13 the D.C. Circuit's ACA International Decision, DA 18-1014, Released October 3, 2018,  
14 attached hereto as **Exhibit 4**, at 1. Thus, a new interpretative ruling is expected from  
15 the FCC addressing these issues soon.

16  
17 The FCC's ruling on the meaning of the term "called party" and the questions of  
18 safe-harbor and continued consent are likely to have a significant impact on this case.  
19 The present case involves a minor amount of texting to a cellular telephone number that  
20 was reassigned to Plaintiff from one of Life for Relief's supporters. That supporter  
21 gave Life for Relief consent to be texted. Thus, the issue of continuity of prior consent  
22 (and possibly the applicability of a safe-harbor) is front-and-center in this dispute. And,  
23 once the FCC rules on those issues, they are binding on this Court. See 28 U.S.C. §§  
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1 2341-51 (the “Hobbs Act,” which divests district courts of the jurisdiction to review  
2 agency decisions). Awaiting that decision provides ample reason for this Court to stay  
3 these proceedings – if it does not dismiss them in the first place.

4       This Court has broad discretion to stay these proceedings. *See Rhines v. Weber*,  
5 544 U.S. 269, 276 (2005) (“District courts do ordinarily have authority to issue stays  
6 where such a stay would be a proper exercise of discretion.”). For example, such a  
7 decision would be in the economic interests of all parties and the Court, and therefore  
8 this Court may stay the proceedings under its own inherent authority. These issues are  
9 even more pronounced in this class action case given the significant time and effort the  
10 parties and the Court would have to expend to administer and litigate a class action  
11 lawsuit of the size and scope Plaintiff seeks, which Defendant would have no choice but  
12 to vigorously contest at a substantial cost. Thus, a stay is both warranted and reasonable  
13 under the present circumstances.  
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## 17 **V. Conclusion**

18       For the above reasons, Life for Relief moves this Court for an order dismissing  
19 the present case for want of personal jurisdiction and venue, or, in the alternative,  
20 transferring this case to the Eastern District of Michigan. Absent those orders, Life for  
21 Relief moves this Court to stay this case pending an upcoming ruling from the FCC as  
22 to the critical issues involved in this case. A proposed order granting Life for Relief’s  
23 Motion to Dismiss is attached hereto as Exhibit 5.  
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1 RESPECTFULLY SUBMITTED this 1st day of July, 2019.

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3 **AND STONE, P.L.C.**

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14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on July 1, 2019, I electronically filed the foregoing with the  
16 Clerk of the Court for the U.S. District Court for the District of Arizona by using the  
17 CM/ECF System

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